APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER,

Petitioner,

—v.—

JOHN W. WINGO, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 16, 1971
CERTIORARI GRANTED JANUARY 17, 1972

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER, *Petitioner*,

—v.—

JOHN W. WINGO, WARDEN, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

INDEX

CHRISTIAN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

WILLIE MAE BARKER, DEFENDANT

RECORD

FOR THE COMMONWEALTH—

The Honorable James P. Hanratty
The Honorable W. E. Rogers, Jr.
Hopkinsville, Kentucky

FOR THE DEFENDANT—

The Honorable Louis P. McHenry
Hopkinsville, Kentucky

BE IT REMEMBERED:

That the defendant, Willie Mae Barker, was indicted, tried and convicted in the Christian County Circuit Court, proceedings had before the Honorable Ira D. Smith, presiding Judge of the Christian Circuit Court with benefit of a Jury at the trial.

Here follows the Court Record in full in words and figures as follows:

On September 15, 1958, the following Court Order was entered in Commonwealth Order Book No. 24, Page 504.

CHRISTIAN CIRCUIT COURT

SEPTEMBER TERM, 1st day, 15th day of September, 1958.

Came the Grand Jury into Open Court and returned the following Indictment, to-wit:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

* * * *

On September 17, 1958, the following Court Order was entered in Commonwealth Order Book No. 24, Page 507.

SEPTEMBER TERM, 3rd day, 17th day of September, 1958.

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

The defendant was this day brought before the Court and informed by the Court of his Indictment. The Case was ordered set down for trial on *Tuesday, October 21, 1958.* The Court appointed L. P. McHenry and Walter Robinson to represent or defend Willie Mae Barker.

* * * *

On October 23, 1958, the Commonwealth made the following Motion which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered *CONTINUED to the February Term of Court, 1959.*

* * * *

On February 10, 1959, the Commonwealth made the following Motion which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered, set down for trial on Tuesday, March 10, 1959.

* * * * *

THIRD JUDICIAL DISTRICT

CHRISTIAN COUNTY CIRCUIT COURT

SEPTEMBER TERM, 1958

THE COMMONWEALTH OF KENTUCKY

against

WILLIE BARKER

INDICTMENT

THE GRAND JURY of Christian County, in the name of and by the authority of the Commonwealth of Kentucky, accuse Willie Barker of the Crime of WILLFUL MURDER committed in the manner and form as follows, to-wit: That said Willie Barker did in the County and State aforesaid, on the 20th day of July, 1958, and within twelve months before the finding of this indictment, did feloniously, willfully and with malice aforethought, kill and murder Orlena Denton by striking her about the head and body with an iron tire tool, or some other blunt instrument, a deadly weapon, and by beating her about the head and body with his hand and fist, and from which striking and beating, the said Denton did then and there die, against the peace and dignity of the Commonwealth of Kentucky.

/s/ JAMES P. HANRATTY
Commonwealth's Attorney
Third Judicial District, Ky.

#17814

THE COMMONWEALTH OF KENTUCKY

vs.

WILLIE MAE BARKER

INDICTMENT FOR WILLFUL MURDER

A TRUE BILL

/s/ R. C. KING
Foreman

Bail $_____

Presented by the Foreman of the Grand Jury to the said court in the presence of the entire Grand Jury, and received from the Court by me and filed in open court this 15th day of September, 1958.

/s/ DURWOOD T. WALKER
Clerk

By _____
D. C.

"We the Jury find the defendant, Willie Barker—GUILTY of WILLFUL MURDER and fix his punishment at LIFE imprisonment in the State Penitentiary."

/s/ ALEX BRAME
One of the Jury

WITNESSES:

H. H. McKinney
Gordon Hall
Captain Harris
Lt. Pritchett
Booth Morris
Sue Morris
Bill Kennedy
SFC Joe M. Gonzales
Howard Gant

On March 12, 1959, the Commonwealth made the following Motion which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED CONTINUED to the June Term, 1959, of Court.*

* * * *

On Motion of the Commonwealth, on June 3rd, 1959, the following Order was entered in Commonwealth Order Book No. 24, Page 591, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

Came the Commonwealth and made Motion to continue the above Case until the disposition of the Silas Manning case now in the Court of Appeals. Said continuance was granted, then came attorneys for the defendant and made motion to the Court that a bond be set for the defendant and the Court, after due deliberation, set the Bond at $5000.00 Five Thousand Dollars.

* * * *

On September 22nd, 1959, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered *CONTINUED to the February Term, 1960 Court.*

* * * *

On February 9, 1960, the Commonwealth made the following Motion which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED, CONTINUED to the June Term of Court, 1960.*

* * * *

On June 6, 1960, the Commonwealth made the following Motion which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED, CONTINUED to the September Term of this Court, 1960.*

* * * *

On September 19th, 1960, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, CONTINUED to the February Term of this Court, 1961.

* * * *

On February 13, 1961, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED, CONTINUED to the June Term of Court, 1961.*

* * * *

On June 5, 1961, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered, *CONTINUED to the September Term, 1961.*

* * * *

On September 18, 1961, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, *CONTINUED to the February Term of this Court, 1962.*

* * * *

On February 12, 1962, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED CONTINUED, to the June Term, 1962.*

* * * *

On February 12, 1962, Louis P. McHenry, Attorney for the defendant made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

Came the attorney for the defense and filed written Motion for a dismissal. The Court took the Motion under advisement, and will pass on said Motion at a later date, during this Term of Court.

* * * *

On February 26, 1962, the following order was made, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

After hearing argument of Counsel for the defendant on Motion For Dismissal, the Motion was overruled and Case was ORDERED, *CONTINUED to the June Term, 1962.*

* * * *

On June 4, 1962, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED LEFT OPEN, for further consideration.*

* * * *

On September 17, 1962, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, CONTINUED to the February Term of this Court, 1963.

* * * *

On February 11, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion the Commonwealth, the above Cause was ORDERED, set down for trial on Tuesday, March 19, 1963.

* * * *

On March 19, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, *CONTINUED* to the June Term, on account of the illness of the Ex-Sheriff, Harold McKinney, over defendant's objection.

* * * * *

On June 3, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was set down for trial on Wednesday, June 19, 1963.

* * * *

On June 17, 1963, the following order appears in Commonwealth Order Book No. 25, Page 392, which reads in full in words and figures as follows:

No. 17814 WILLFUL MURDER

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

WILLIE MAE BARKER, DEFENDANT

The above Cause was ordered *CONTINUED*, and on objections and exceptions for the defense, The Court placed the Commonwealth under rule and on notice to be prepared and ready for trial at the September Term, otherwise the above Case would be *DISMISSED for lack of prosecution.*

* * * *

On August 24, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE BARKER

On Motion of the Commonwealth, the Attorney for defendant having been advised, the above Cause was set for trial on Wednesday, October 9, 1963.

* * * *

CHRISTIAN CIRCUIT COURT

[Filed in Open Court, Oct. 9, 1963, Attest,
/s/ Durwood T. Walker, Clerk]

Indictment No. 17814

COMMONWEALTH OF KENTUCKY, PLAINTIFF

—*vs*—

WILLIE MAE BARKER, DEFENDANT

MOTION TO DISMISS

Comes the defendant, Willie Mae Barker, through Counsel, and moves the Court to dismiss the action now pending against him in the above styled Court.

He states that he was indicted in the September term of 1958, for the crime of wilful murder, that he is innocent of the charge, and since said indictment and the first call of said case, he has been prepared to prove his innocence.

He states that the prosecution (Commonwealth of Kentucky) has made a motion to continue at each term of Court since February, 1959 term, and said motions were granted over the objections of the defendant.

He further states that he has been deprived of his rights under the constitution of the United States, and the constitution of Kentucky, in that he has been denied of his rights to a speedy trial.

Wherefore, he prays that this motion be granted, and that the case pending against him be dismissed for lack of prosecution on the part of the Commonwealth of Kentucky.

This the 9th day of October, 1963.

/s/ Louis P. McHenry
LOUIS P. MCHENRY
Attorney For Defendant
408½ South Main Street
Hopkinsville, Kentucky

CHRISTIAN CIRCUIT COURT

[Filed in Open Court, Oct. 9, 1963, Attest, /s/ Durwood T. Walker, Clerk]

Indictment No. 17814

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

WILLIE MAE BARKER, DEFENDANT

RESPONSE TO MOTION TO DISMISS

For response to defendant's Motion to Dismiss, comes the Commonwealth of Kentucky and by its attorneys states as follows:

That the defendant and Silas Manning were separately indicated by the September, 1958, term of the Christian County Grand Jury for the willful murder of Pat Denton and Orleana Denton; two indictments were returned against the defendant Manning, one charging the death of Pat Denton and the other the death of Orleana Denton, and two indictments were returned against Barker, one charging the death of Pat Denton and the other the death of Orleana Denton, which murders were charged to have occurred in July, 1958; that the Commonwealth elected to try Manning first and promptly proceeded to trial at the same term of Court with the result that the Jury hung at the first trial which was held on October 23, 1958, and a mistrial was declared; that at the next succeeding term of Christian Circuit Court Manning was again tried with the result that on March 12, 1959, the Jury returned a penalty of death in the electric chair; that Manning appealed his sentence, which sentence was reversed by the Court of Appeals, the mandate being received by the Christian Circuit Court on November 19, 1959; that at the next succeeding term of Christian Circuit Court Manning was again tried and was again given a sentence of death in the electric chair on February 20, 1960; that another appeal ensued and the judg-

ment was reversed by the Court of Appeals, the mandate being received by the Christian Circuit Court on June 23, 1961; that in compliance with the judgment of the Court of Appeals, at the next ensuing term of the Christian Circuit Court on September 22, 1961, defendant Manning was granted a change of venue to Caldwell County Circuit Court; that during the next succeeding term of the Caldwell Circuit Court in October, 1961, Manning was again tried; the jury being unable to agree with the result of another mistrial; that at the next succeeding term of Caldwell Circuit Court Manning in March, 1962, was tried and given a sentence of life; that the foregoing five trials were on the indictment charging the death of Pat Denton; that in the next succeeding term of the Christian Circuit Court held in June, 1962, the Court granted a change of venue to the Todd Circuit Court on an indictment charging the death of Orleana Denton; that in the December, 1962, term of the Todd Circuit Court Manning was tried and given a life sentence; thus Manning on the two indictments was tried a total of six times; that the testimony of Manning against defendant Barker was absolutely necessary in the trial of the Barker indictments and could not be procured until the conclusion of the cases against Manning himself as he always declined to testify for the reason of self-incrimination under advice of his attorneys as shown by the attached affidavit; that the trial of Barker was originally set for the February 1963 term of Christian Circuit Court but could not be held at that time due to the serious and grave illness of former sheriff McKinney as shown by the attached affidavits of said McKinney and his physician, Dr. Harvey Stone; that the case was again set for the June 1963 term but again could not be held at that time due to the illness of McKinney; that upon the recovery of McKinney the trial was held at the next ensuing term of Court in October, 1963.

The Commonwealth states that it has tried the case against Barker as promptly as possible as Manning was an absolutely necessary witness against Barker, being an accomplice and the only one who according to his testimony actually saw Barker in the commission of the crimes; that as pointed out it was not possible to pro-

cure this testimony until the cases against Manning could be concluded, and the Commonwealth states that the cases against Manning were concluded as promptly as possible as he was tried virtually each time at succeeding terms of the Christian, Caldwell and Todd Circuit Courts; that the last two continuances were occasioned by the unavailability of Sheriff McKinney whose testimony was absolutely necessary in corroborating the accomplice Manning; that Barker was granted bail which he made on June 4, 1959, and was at liberty from said date under bail until his conviction, that defendant, through any delay, lost no testimony through the death of witnesses or otherwise, and his case was not affected.

WHEREFORE, the Commonwealth moves that the Motion to Dismiss be itself dismissed and held for naught. This the ninth day of October, 1963.

/s/ James P. Hanratty
JAMES P. HANRATTY
Commonwealth's Attorney
Hopkinsville, Kentucky

/s/ W. E. Rogers
W. E. ROGERS
County Attorney
Christian County,
Hopkinsville, Ky.

CHRISTIAN CIRCUIT COURT

Indictment No. 17814

[Filed Jan. 2, 1964, Doris Owens, Clerk, Court of Appeals]

COMMONWEALTH OF KENTUCKY, PLAINTIFF

—*vs*—

WILLIE MAE BARKER, DEFENDANT

TRANSCRIPT OF EVIDENCE

Hopkinsville, Christian County, Kentucky, October 9, 1963, before The Honorable Ira D. Smith, Judge.

COUNSEL FOR PLAINTIFF:

Mr. W. E. Rogers, Jr.
County Attorney
Hopkinsville, Kentucky

and

Mr. James P. Hanratty
Commonwealth's Attorney
Hopkinsville, Kentucky

COUNSEL FOR DEFENDANT:

Mr. Louis P. McHenry
Hopkinsville, Kentucky

* * * *

[fol. 110] MARTHA BARBER, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. LOUIS P. McHENRY:

Q You are Mrs. Barber?
A Yes, sir.

Q Mrs. Barber, you are the sister-in-law of Silas Manning?

A Yes, sir.

Q Do you recall around July 20, 1958, when Mr. and Mrs. Denton were killed?

A Yes, sir.

Q I believe this was on a Saturday. Do you recall seeing Barker on that night prior to that?

A Yes, sir.

Q Just tell The Court in your own words, whether Barker was at your house, at your sister's house, that night. Tell them what you know. You have testified in all these trials, haven't you?

[fol. 111] A Yes, sir. Well, all I know is that Silas Manning he left that Saturday night around about 11:30 or 12:00 and didn't come in until about day that morning and Will Barker was there at the house.

Q He was there all night long?

A Yes, sir.

Q Now, did you see Silas when he came in that morning?

A Yes, sir, I did.

Q How was he dressed?

A What do you mean? What did he have on?

Q Yes, shirt, coat or

A Yes, he had on a shirt and a pair of pants.

Q Did you see him when he first came in?

A Yes, sir.

Q What was the condition of his clothes?

A He had blood all over his clothes and the front of his shirt.

Q Now, were you the one who woke up Barker?

A Yes, I was.

Q What did you tell him then?

A I told him to wake up because here was Silas.

Q Did he see Silas then?

A Yes, because Silas was there in the kitchen. The light burned all night long in the kitchen.

Q Now, had Silas changed his clothes then?

A Well, I think he had done pulled his shirt off and [fol. 112] burned it.

Q Had pulled his shirt off and burned it?

A Yes.

Q Did you hear he and Barker talking?

A I think—if I am not mistaken—it has been so long I just don't know how to think. I think he asked Silas where was his car.

Q What did Silas say to him?

A He said somebody had done stole it, but he would get it.

Q He told him somebody had stolen it, but he would get it?

A Yes, sir.

Q And you are positively sure that this man was in the house all night long?

A I am sure of that.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 2046

WILLIE MAE BARKER, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ORDER

The above petitioner, a state prisoner, has caused to be filed with this Court a petition for writ of habeas corpus questioning the legality of a life sentence on the ground that he was denied his right to a speedy trial by a five year lapse of time between his indictment and trial. Leave to proceed in forma pauperis has been granted and an order to show cause has issued to which a return has been made.

The question herein raised by petitioner was raised on the appeal of his conviction which the Kentucky Court of Appeals affirmed, holding that there was no showing of prejudice resulting from the delay and that petitioner had waived his right to a speedy trial by his failure to so move until February 12, 1963. Barker v. Commonwealth, Ky., 385 S.W.2d 671 (1964).

The Sixth Amendment right to a speedy trial was not applied to the states until after petitioner's conviction and appeal, Klopfer v. North Carolina, 386 U.S. 213. However, as the Kentucky Court of Appeals concluded, serious questions of due process are raised by a delay of five years time. We shall therefore review the record of petitioner's case in light of federal constitutional standards. (Respondent has filed the transcripts of court records and testimony.)

It is well settled that the right to a speedy trial is, by necessity, relative, United States v. Ewell, 383 U.S. 116;

Von Feldt v. United States, 407 F.2d 95 (8th Cir., 1969). Among the factors that must be taken into consideration in determining if the right has been violated are the length of the delay, the reasons for the delay, the prejudice to the defendant caused by the delay, waiver of the right by the defendant, and the blame-worthiness of the prosecution and defense, Odem v. United States, 410 F.2d 103 (5th Cir., 1969); Harling v. United States, 401 F.2d 392 (D.C. Cir., 1968). In applying the above to a specific case relevant considerations include: whether the delay was purposeful or oppressive, United States ex rel Solomon v. Mancuse, 412 F.2d 88 (2nd. Cir., 1969); Bandy v. United States, 408 F.2d 518 (8th Cir., 1969); whether defendant had the assistance of counsel during the delay, United States v. Peacock, 400 F.2d 992 (6th Cir., 1968); whether defendant was at liberty during the delay, Von Feldt v. United States, *supra*, at p. 98; and whether or not it appears that defendant's ability to defend himself was impaired by the delay, United States v. Ewell, *supra*, at p. 120; Bynum v. United States, 408 F.2d 1207 (D.C. Cir., 1969).

Early in the morning of July 20, 1958 one Pat Denton and his wife, Orleana, were beaten to death in their home near Hopkinsville, Kentucky. Shortly thereafter Silas Manning and petitioner were arrested and charged with the murders. Indictments were returned in September and on October 23, 1958 Manning went to trial. A hung jury resulted and on March 12, 1959 he was tried again. At this trial Manning was found guilty and sentenced to death. On October 16, 1959 the Kentucky Court of Appeals reversed, Manning v. Commonwealth, Ky., 328 S.W.2d 421 (1959), and February 20, 1960 was subsequently set as Manning's next trial date. Again he was found guilty and sentenced to death and again the Court of Appeals reversed, Manning v. Commonwealth, Ky., 346 S.W.2d 755 (1961). In October 1961 Manning again went on trial and for the second time a hung jury resulted. In March 1962 Manning was tried and found guilty of the murder of Pat Denton and

in December 1962 he was tried and found guilty of the murder of Orleana Denton. Manning received a life sentence following each of these trials. On October 9, 1963 petitioner was tried.

In responding to a 1963 motion to dismiss filed by petitioner in the Christian County Court the Commonwealth's Attorney contended, and respondent now contends, that Manning's testimony was absolutely necessary to convict petitioner and that Manning's attorneys had advised him not to testify until his own case was settled. (Throughout his six trials Manning never took the stand.) Following Manning's final trial petitioner's trial was set for the February 1963 term of the Christian Court but was continued due to the fact that Harold McKinney was seriously ill at that time. Mr. McKinney was the sheriff of Christian County and had conducted the investigation of the murders and was therefore considered by the prosecution to be a necessary witness. Whether or not petitioner could have been convicted without Manning's or McKinney's testimony is left open. Suffice it to say that their testimony (especially Manning's) played a major part in petitioner's conviction and the prosecution's reluctance to proceed without these witnesses cannot be interpreted as a lack of diligence, Harling v. United States, 401 F.2d 392, 395 (D.C. Cir., 1968); Odem v. United States, *supra*.

The records of the Christian Circuit Court reflect that L. P. McHenry and Walter Robinson were appointed to defend petitioner on October 21, 1958. On June 3, 1959 petitioner was released on $5,000 bond and remained on bond until after his conviction. On February 26, 1962 and again on October 9, 1963 petitioner's attorneys moved to dismiss giving as grounds therefor that the Commonwealth had failed to prosecute and that petitioner *had been denied* his right to a speedy trial, however, it does not appear that petitioner at any time actually moved for a speedy trial. Furthermore, even if petitioner's February motion to dismiss could be interpreted as a demand for a speedy trial, then it was petitioner's first such demand and the ensuing eight month delay cannot be deemed

unreasonable in light of the fact that a material witness was seriously ill and unable to testify.

That the right to a speedy trial is a personal right which will be deemed waived if not asserted is not absolute, Pitts v. State of North Carolina, 395 F.2d 182, 187 (4th Cir., 1968); United States v. Hephner, 410 F.2d 930 (7th Cir., 1969). In a case where the defendant does not know of his rights or of the pending charges, or because of his incarceration and ignorance cannot assert his rights, waiver is not recognized. Here, however, petitioner was free on bail and had the assistance of counsel. Petitioner does not urge that his counsel were lax in their duty by not moving for a speedy trial nor would this Court look favorably upon such an allegation under the facts of this case. In light of the fact that petitioner's accomplice had twice received the death penalty counsel could have justifiably concluded that the best available strategy was to keep their client on bail as long as possible.

While there is authority to the effect that a delay of the magnitude found here constitutes a prima facie showing of prejudice, *Pitts*, supra, such is overcome in the case at bar by the trial record. While the defense presented at trial appears weak, such weakness cannot be attributed to the unavailability of witnesses or the diminished recollection of witnesses. If any witnesses were not available such has not been brought to the Court's attention and it would appear that everyone concerned testified. Nor is the recollection of the witnesses challenged. In fact it appears that the witnesses at petitioner's trial had been kept constantly abreast of their activities on the morning of July 20, 1958 by the six Manning trials.

The right to a speedy trial involves a balancing of interests. On the one hand the defendant cannot be made to linger in a legal limbo while the prosecution builds its case, but on the other hand the right is not intended to preclude the rights of public justice, Beavers v. Haubert, 198 U.S. 77, 87. Under the facts of the present case the interest of public justice prevails. To hold otherwise would be to force prosecutions to proceed un-

prepared when there has been no demand for trial by an informed defendant.

Petitioner also questions the legality of his sentence in the light of Rule 9.62, Kentucky Rules of Criminal Procedure, which provides that a conviction cannot be had upon the testimony of an accomplice without independent evidence connecting the defendant with the offense. Suffice it to say that the necessary corroborating evidence was offered. While petitioner might find the corroborating evidence somewhat wanting, the weight to be assigned it was for the jury and cannot now be considered. Ballard v. Howard, 403 F.2d 653 (6th Cir., 1968).

Accordingly, IT IS HEREBY ORDERED that the petition for writ of habeas corpus be and the same is denied.

NOTE: The above has been reviewed by this Court in light of the Supreme Court's decision in Dickey v. State of Florida, —— U.S. —— (May 25, 1970), and it is concluded that no changes are necessitated by that decision.

June 1, 1970

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:

Willie Mae Barker, Petitioner
John B. Breckinridge, Attorney General,
Commonwealth of Kentucky

[Mailed 6/3/70, /s/ C. R.]

[Entered Jun. 3, 1970, August Winkenhofer, Jr., Clerk, By /s/ [Illegible], Deputy Clerk]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20662

WILLIE MAE BARKER, PETITIONER-APPELLANT

v.

JOHN W. WINGO, Warden, Kentucky State Penitentiary, RESPONDENT-APPELLEE

On Appeal from the U.S. District Court
for the Western District of Kentucky

Decided and Filed May 20, 1971

Before: WEICK, CELEBREZZE, and MCCREE, Circuit Judges

MCCREE, Circuit Judge. This case is an appeal from an order denying Willie Mae Barker's petition for a writ of habeas corpus. The question presented is whether appellant's Sixth Amendment right to a speedy trial was violated by the Commonwealth of Kentucky's five-year delay between indictment and trial. We hold that under the circumstances of this case appellant was not denied this constitutional right.

Appellant was indicted for the murder of Orlena Denton, one of two elderly persons who were beaten to death on September 15, 1958, and trial was originally set for October 21 of that year. The Commonwealth obtained 16 continuances which postponed the trial until October 9, 1963. During this entire five year period, appellant was represented by counsel. For about nine months after indictment, appellant was incarcerated; but from June

4, 1959, until his conviction in 1963, he was free on $5,000 bail.

Initially, the delay was occasioned by the Commonwealth's desire that the prosecution of appellant's alleged accomplice, Silas Manning, be first concluded. Apparently, the prosecution considered Manning's testimony essential to the prosecution of Barker. As counsel testified, Manning would have invoked his privilege against self-incrimination if he had been called to testify against Barker because he had not yet been tried and convicted of the two murders for which both had been indicted. Manning was eventually convicted of the two murders in separate trials concluded in March and December, 1962. Previous trials had resulted twice in hung juries and twice in reversals by the Kentucky Court of Appeals. *Manning* v. *Commonwealth*, 328 S.W.2d 421 (Ky. 1959); *id.*, 346 S.W.2d 759 (Ky. 1961). Ultimately, Manning testified for the prosecution at appellant's trial.

On February 12, 1963, appellant for the first time made objection to the delay of his trial and moved to dismiss the charges against him. The motion was denied, and shortly thereafter, on March 19, 1963, the Commonwealth asked for and was granted a further continuance because of the illness of a material witness, Sheriff Mckinney, who had investigated the Denton murders. Appellant was tried and convicted by a jury in October, 1963, in the first term of court after the Sheriff recovered.

Barker's conviction was affirmed by the Kentucky Court of Appeals, despite his claim that he had been denied his right to a speedy trial. *Barker* v. *Commonwealth*, 385 S.W.2d 671 (Ky. 1965). Appellant thereafter brought this action in the United States District Court for the Western District of Kentucky, which denied relief without an evidentiary hearing.

Whether delay between indictment and trial violates the constitutional right to a speedy trial depends upon the circumstances of each case. *Dickey* v. *Florida*, 398 U.S. 30 (1970); *United States v. Ewell*, 383 U.S. 116, 120-21 (1966); *Beaver* v. *Haubert*, 198 U.S. 77, 86-87 (1904). The mere lapse of time is not enough to consti-

tute a denial of speedy trial. *Von Feldt* v. *United States*, 407 F.2d 95 (8th Cir. 1969); *Carroll* v. *United States*, 392 F.2d 185 (1st Cir. 1968); *United States* v. *Beard*, 381 F.2d 325 (6th Cir. 1967). However, the length of time elapsed is obviously an important factor in determining whether this right has been violated. Here the total delay was five years. For four years and three months—from September 1958 to December 1962—the prosecution obtained continuances while it attempted to convict Manning. Appellant did not object to this delay until his motion to dismiss was filed on February 12, 1963.

We regard this motion to dismiss as a demand for a speedy trial,[1] but it is clear that the time before the motion was made should not be counted as part of the period of delay in determining whether the right was violated. *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); *Kelley* v. *Kropp*, 259 F.Supp. 417, 419 (E.D. Mich. 1966).

The "demand rule"[2] provides that unless a defendant makes some attempt to resist postponement by the prosecution or demands immediate trial, he waives his Sixth Amendment right. *United States* v. *Jones*, 403 F.2d 498 (7th Cir. 1968); *United States* v. *Perez*, 398 F.2d 368 (7th Cir. 1968); *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967) (5-year delay between mistrial of defendant and retrial does not violate the right to speedy trial where no demand was made); *Moser* v. *United States*, 381 F.2d 363 (9th Cir.), *cert. denied*, 389 U.S. 904 (1967); *United States* v. *Hill*, 310 F.2d 601 (4th Cir. 1962); *Bruce* v. *United States*, 351 F.2d 318 (5th Cir. 1965) (7-year delay did not violate right where no demand was made); *Hastings* v. *McLeod*, 261 F.2d 627 (10th Cir. 1968).

---

[1] It would serve no good purpose to require defendant to file a formal demand for a speedy trial under these circumstances. The motion to dismiss made here is sufficient to meet the strict requirements of the "demand rule". *Cf. United States* v. *Maxwell*, 383 F.2d 437 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967).

[2] *See generally Annot.*, 129 A.L.R. 572, 587 (1940), 57 A.L.R.2d 302, 326 (1958), for a list of cases following the "demand rule".

The rationale behind the demand rule is that the right to a speedy trial is intended to serve "as a shield for the defendant's protection but not as a sword for his escape." *United States* v. *Maxwell*, 383 F.2d 437, 441 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967). An assumption seldom questioned in the corridors of criminal courts is that delay ordinarily favors the defendant. *But see Dickey* v. *Florida*, 398 U.S. 30, 49 (1970) (Brennan, J., concurring). Accordingly, when a defendant has counsel, his failure to request a speedy trial is understood to indicate that he prefers the limited restriction of bail to the possibility of the harsher restraint that may follow from conviction. Here, appellant may have thought his chances better if he silently accepted the many continuances sought by the prosecution to see if the Commonwealth would eventually convict Silas Manning. It was only after Manning was finally convicted that Barker sought a speedy trial.

Although a few recent cases and articles have suggested abandonment of the demand rule,[3] numerous courts have recently reaffirmed the rationale and vitality of this doctrine and have specifically refused to repudiate it. *See, e.g., United States* v. *Perez*, 398 F.2d 658 (7th Cir. 1968); *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967). We agree

---

[3] *Dickey* v. *Florida*, 398 U.S. 30, 48-50 (1970) (Brennan, J., concurring). *United States* v. *Mann*, 291 F.Supp. 268 (S.D. N.Y. 1968); *United States* v. *Richardson*, 291 F. Supp. 441 (S.D. N.Y. 1968). *See also* Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 Val. L. Rev. 197 (1969). The rationale for eliminating the demand rule is twofold. First, it seems harsh to demand that a defendant, particularly if free on bail, initiate a process which may result in a substantial loss of freedom. (Here, appellant could have been sentenced to death on conviction.) Few defendants will make such a demand except when the prosecution's case is weak or weakened, as by absence of a key prosecution witness —which may be grounds for denial of the motion.

Second, the Supreme Court in recent decisions has been moving toward a position that constitutional rights cannot be waived unknowingly or inarticulately. The demand rule, which interprets inaction as waiver, is in conflict with this trend. *See Annot., supra* note 2; *Dickey* v. *Florida*, 398 U.S. 30, 49-50 (1970) (Brennan, J., concurring).

with the weight of federal authority,[4] and therefore we will consider only the period after February 12, 1963, in determining whether Barker's right to a speedy trial was violated. We hold that the remaining period of delay, from appellant's demand until the time he was brought to trial, October, 1963, was not unduly long. *United States* v. *Ewell*, 383 U.S. 116, 120-21 (1966).

More significantly, appellant has shown no prejudice resulting from this delay. There is no claim that during this eight-month period (or before) any witnesses became unavailable. Although appellant claims that certain defense witnesses' memories faded over the years, this assertion is not substantiated by the record. Appellant's witnesses testified with conviction and, in comparison with their testimony in the earlier Manning trials, without apparent mnemonic loss. Under these circumstances, appellant is not entitled to a discharge from custody. *United States* v. *Ewell*, 383 U.S. 116, 120-21 (1966); *United States ex rel. Solomon* v. *Mancusi*, 412 F.2d 88 (2d Cir. 1969). The only reason for delay following the demand was the unavailability of a material witness, Sheriff McKinney, due to illness.[5] Immediately following the witness' recovery the trial was commenced and diligently prosecuted.

The judgment of the District Court is affirmed.

---

[4] *See Annot., supra*, note 2, and accompanying text.

[5] The unavailability of a key witness is usually held to be a valid reason for delay. *See, e.g., United States ex rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963) (delay of 43 months after indictment justified since witness resided in India and could not be compelled by the state to return in order to testify).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20,662

[Filed May 20, 1971, Carl W. Reuss, Clerk]

WILLIE MAE BARKER, PETITIONER-APPELLANT

vs.

JOHN W. WINGO, Warden, Kentucky State Penitentiary,
RESPONDENT-APPELLEE

BEFORE: WEICK, CELEBREZZE and MCCREE,
Circuit Judges

JUDGMENT

Appeal from the United States District Court
for the Western District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded inasmuch as this appeal is in Forma Pauperis.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

SUPREME COURT OF THE UNITED STATES

No. 71-5255

WILLIE MAE BARKER, PETITIONER

v.

JOHN W. WINGO, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 17, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 459331 539